UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---X
IN RE: AHMAD SALEHZADEH, et. al.

Case No. 14-22666

Debtor(s)

Chapter 11

---X

OBJECTION TO DEBTOR'S DISCLOSURE STATEMENT

TO: THE HONORABLE ROBERT D. DRAIN,
UNITED STATES BANKRUPTCY JUDGE:

U.S. Bank Trust, N.A., as trustee for LSF9 Master Participation Trust (hereinafter "**U.S. Bank**"), a secured creditor of Ahmad Salehzadeh, (the "**Debtor**"), by and through its counsel, Cohn and Roth, submits this objection (the "**Objection**") to the Debtor's Disclosure Statement dated August 11, 2015(the "**Disclosure Statement**") and entered as docket number 96. In support of the objection, U.S. Bank respectfully states the following:

I. PRELIMINARY STATEMENT

The Disclosure Statement fails to meet the requirements of section 1125 of Title 11 of the United States Code (the "**Code**"). Specifically, the Disclosure Statement fails to (1) Provide adequate information of the kind and in sufficient detail to allow claim holders to make informed judgment about the proposed plan of reorganization (the "**Plan**"); (2) Explain how the Plan will be funded in the event the sale of property is insufficient to pay off secured claims; (3) Explain how secured claims against different debtors, secured by different properties can properly be considered "substantially similar". The Disclosure Statement as currently filed fails to meet the requirements of section 1125 of the Code, and should not be approved by the Court.

II. STATEMENT OF FACTS

1. On May 14, 2014, (the "**Petition Date**"), the Debtor filed a voluntary petition for relief under Chapter 11 of the Code, (the "**Petition**").

2. The Debtor has remained in possession of most of his assets as a debtor-in-possession. On August 11, 2015, the Debtor filed the Disclosure Statement and the Joint Chapter 11 Plan of reorganization (the "**Plan**").

3. The proof of claim filed by JPMorgan Chase Bank N.A. on September 15, 2014, docketed as claim number 13-1 ("**Proof of Claim number 13**"), was transferred to U.S. Bank filed as docket entry number 65 on October 30, 2014, (the "**Transfer of Claim**").

4. U.S. Bank Trust, as Trustee for LSF9 Master Participation Trust now holds the Mortgage and Note to the property known as 10 Franklin Avenue, White Plains, NY 10601, apartment 2P (the "**10 Franklin Ave. Apartment 2P Property**" or the "**Property**") which is the basis for Proof of Claim number 13.

5. The Debtor is in default in his post-petition adequate protection mortgage payments (the "**Post-Petition Payments**") from October 1, 2014, and has not made any Post-Petition Payments since December of 2014.

III. OBJECTION

A. Disclosure Statement does not contain adequate information

I. Governing Law

6. The Disclosure statement as filed does not detail how the Plan will ensure that U.S. Bank is to be paid it's secured claim. Section 1125 of the Code provides that a disclosure statement must contain "adequate information" describing a confirmable plan. 11

U.S.C. § 1125; see also, *In re Quigley Co.*, 377 B.R. 110, 115 (Bankr. S.D.N.Y. 2007).

7. The Code defines adequate information as:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that wold enable such a hypothetical investor of the relevant class to make an informed judgment about the plan . . .

11 U.S.C. § 1125(a)(1); See also, *Momentum Mfg. Corp. v. Employee Creditors Comm.* (*In re Momentum Mfg. Corp.*), 25 F.3d 1132, 1136 (2d Cir. 1994); *In re Adelphia Commc'ns Corp.*, 352 B.R. 592, 596 (Bankr. S.D.N.Y. 2006).

8. To be approved, a disclosure statement must include sufficient information to apprise creditors of the risks and financial consequences of the proposed plan. See, *In re McLean Indus., Inc*., 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987). A disclosure statement must "contain simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible alternatives . . .". *In re Copy Crafters Quickprint, Inc.* 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988).

II. Failure to Properly address U.S. Bank's Claim

9. The Disclosure Statement does not contain adequate information as required by § 1125 of the Code. On Page 9, the Disclosure Statement provides that upon the sale of the 10 Franklin Ave. Apartment 2P Property, the secured lien holder will be paid for payment to the secured lien holder on its secured claim upon the sale of the 10 Franklin Ave. Apartment 2P Property.

10. The Disclosure Statement identifies Wells Fargo as the secured lender with a claim against the Property. Wells Fargo has no right to receive the proceeds from the sale

of the Property. U.S. Bank holds the lien on this Property and is entitled to receive proceeds any sale of the Property prior to any other party being paid. This is evidenced by Proof of Claim number 13 and the Transfer of Claim to U.S. Bank.

11. The Disclosure Statement should not be approved until it is amended to detail that U.S. Bank will be paid all proceeds upon the sale of the Property until its entire secured claim, including any interest due, is recovered.

12. The Disclosure statement contains false information, and lacks sufficient information and should not be approved until it meets the requirements of § 1125 of the Code.

III. Failure to Provide adequate information regarding how the secured claims will be paid

13. The Disclosure Statement indicates that the lien holder on the 10 Franklin Ave. Apartment 2P Property will be paid in full from the proceeds of the sale. However, the Disclosure Statement does not provide any source of valuation, other than the Debtor's subjective belief, that the sale will result in proceeds sufficient to repay the debt owed on the secured lien.

14. Without an appropriate and objective valuation, U.S. Bank does not know whether the sale of the Property will result in repayment of its claim, and thus lacks sufficient information to make an informed judgment about the Plan.

15. Additionally, the Plan fails to explain in any way, how, when, or what method will be employed to repay the remainder of U.S. Bank's claim in the event that the sale does not result in sufficient proceeds to repay the claim in full. There are no provisions in the Plan or in the Disclosure Statement for how U.S. Bank's claim is to be paid if the sale fo the Property results in less than a full recovery.

16. The Disclosure Statement should not be approved until it contains adequate information concerning the repayment of all claims, including information necessary to determine the feasibility of the repayment of all claims.

IV. Failure to Provide adequate information regarding when the secured claims will be paid

17. Finally, there are no provisions in the Disclosure Statement detailing when the sale of the Property, or any of the properties, will occur. The Disclosure Statement, if not having a specific date, should at least contain a deadline by which the sale will occur and the creditor's will be paid. Under the current Plan and Disclosure Statement, there is no requirement the Debtor sell at any time at all. In order to have adequate information, the Disclosure Statement must indicate an approximate time when a creditor can expect to be paid.

18. The Disclosure Statement should not be approved as currently filed, as it does not meet the requirements of § 1125 of the Code. " . . . it is important for . . . [creditors] that the Disclosure Statement contain simple and clear language delineating the consequences of the proposed plan on their claims and the possible Code alternatives so that they can intelligently accept or reject the Plan." *In re Copy Crafters Quickprint, Inc.* 92 B.R. 973 (Bankr. N.D.N.Y. 1988). Currently, U.S. Bank is not listed in the plan at all, there is no indication of when the claim U.S. Bank holds will be paid, and there is no support that the method the Debtor intends to use to obtain payment will result in payment in full. Further, if the sale does not result in full payment, there is no indication of how its claim will be treated.

V. Failure to make any adequate protection payments

19. Given the Failure of the Disclosure Statement to lay out a time frame for

the sale of the Property, it seems even more relevant and necessary to know whether the Debtor intends to make adequate protection payments from the rental income he is currently receiving. The Debtor has not made any such payments to day.

20. The Disclosure Statement should not be approved until it clarifies the Debtor's responsibility to make adequate protection payments during the indefinite period of time between confirmation and sale of the Property.

B. The Disclosure Statement should not be approved because the Plan is patently non-confirmable

I. Governing Law

21. The Court may consider the confirmability of a plan in the context of a hearing on the approval of the disclosure statement. See, *In re Am. Capital Equip., LLC.*, 688 F.3d 145, 156 (3d Cir. 2012) (holding that a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage that a later confirmation hearing would be futile because the plan described by the disclosure statement is patently unconfirmable). Further, if a plan is non-confirmable on its face, the application to approve the disclosure statement must be denied. See, *In re GSC, Inc.*, 455 B.R. 132, 157, n. 27 (Bankr. S.D.N.Y. 2011) (stating that a non-confirmable plan is grounds for rejection of the disclosure statement; a disclosure statement that describes a plan that is non-confirmable on its face should not be approved, (Citing *Quigley* 377 B.R. at 115)).

22. Thus, approval of a Disclosure Statement should be withheld if 1) it is apparent that the plan will not comply with Code § 1129(a) and 2) if it does not contain such information so that all creditors and equity shareholders can make an intelligent and informed

decision as to whether to accept or reject the plan. *See, In re Unichem Corp.*, 72 B.R. 95, 97 (Bankr. N.D. Ill 1987) *In re Pecht* 53 BR 768, 772 (Bankr. E.D. Va. 1985); *In re McCall* 44 B.R. 242, 243 (Bankr. E.D. Pa. 1984).

23. Secured creditors with claims against different properties generally are entitled to a separate classification. *In re Global Ocean Carriers Ltd*., 251, B.R. 31, 42 Fn8 (Bankr. D. Del 2000) (Citing *In re Commercial Western Finance Corp*. (*Western Finance*) 761 F.2d 1329 (9th Cir. 1985). As explained by the court in *In the Matter of Charles O. Bugg*, §1122(a) of the Bankruptcy Code codifies case law, ". . . and must be construed accordingly". 172 B.R. 781, 784 (E.D. Pa. 1994). As such, "Secured Creditors may not be classified together when they have liens on different property . . . since their respective legal rights are not substantially similar." *Id*. (Quoting, *In re Richard Buick* 126 B.R. 840, 853 (Bankr. E.D. PA. 1991)).

24. The court in *Western Finance* explained, § 1122(a) limits the ability of a plan to group claims together only to the extent that they are "substantially similar" to the other claims in that class., and claims against different pieces of property are not substantially similar. 761 F.2d at 1338 (Citing *Mokava Corp v. Dolan*, 147 F.2d 340 (2d. Cir. 1945); *In re Sullivan* 26 B.R. 677 (Bankr. W.D.N.Y. 1982)). "Courts have consistently held as a matter of law that secured creditors on different pieces of property are not similar" 172 B.R. at 784 (Citing *In re Monroe Well Serv., Inc*. 80 B.R. 324 (Bankr. E.D. Pa. 1987)).

I. The Plan impermissibly classifies U.S. Bank's Claim with claims that are not "substantially similar"

25. Here, the Disclosure Statement details how the Plan has placed within the

same class labeled Class 2", the following claims:

(1) U.S. Bank against the 10 Franklin Ave. Apartment 2P Property (which the Plan and Disclosure Statement mistakenly label as Wells Fargo's claim);

(2) Chase Bank against the real property known as 312 Main Street, Apartment 5C (which the Plan and Disclosure statement again mislabel as Chase Bank does not appear to hold a secured claim in this case);

(3) Westbrook tenants corporation against several apartment located at 10 Franklin Ave.; and

(4) US Bank Equipment finance claim in goods, inventory, and other chattel used in the Debtor's Subway businesses.

26. Not only does this Plan place secure claims against separate pieces of real property in the same class, but it classifies claims against inventory, goods, and other personal property in the same class as claims against real property. The Plan violates §§ 1122(a) and § 1129 on its face.

27. Although this is not a confirmation hearing on the Plan, as noted above, the Court should not approve a Disclosure Statement where the Plan in unconformable on its face. In this case, the Plan impermissibly classifies claims together that are not substantially similar, and is unconformable on its face. As such, the Disclosure Statement must be not be approved.

WHEREFORE, because the Disclosure Statement fails meet the requirements laid out in § 1125 of the Bankruptcy Code, and because U.S. Bank is unable to reach an informed decision regarding the viability and potential benefits of the proposed plan of reorganization, and because the Plan of reorganization as proposed is not confirmable on its face as it violates §§1122(a) and § 1129 of the Bankruptcy Code, U.S. Bank objects to the approval of the Disclosure Statement and respectfully requests this Court deny the motion to approve the Disclosure Statement.

Dated: September 17 2015
Mineola, New York

COHN & ROTH

By: /s/ Michael H. Cohn
Michael H. Cohn
Attorneys for Movant
100 E. Old Country Road
Mineola, New York 11501
(516) 747-3030